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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OSCAR ORTIZ MARTINEZ, Defendant and Appellant.	E054437 (Super.Ct.No. RIF142847) OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed with directions.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and A. Natasha Cortina and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Oscar Ortiz Martinez appeals from his conviction of felony murder (Pen. Code,[1] § 187, subd. (a)) with the special circumstance of murder in the course of a kidnapping (§§ 190.2, subd. (a)(17)(B), 207). Defendant contends (1) the evidence was insufficient to support his conviction of felony murder on a theory of either aiding and abetting or conspiracy; (2) the evidence was insufficient to support the kidnapping special circumstance allegation; (3) the trial court erred in failing to instruct on merger; and (4) the trial court erred in imposing a parole revocation fine. The People concede the parole revocation fine was erroneously imposed. We find no other errors.

II. FACTS AND PROCEDURAL BACKGROUND

A. Prosecution Evidence

In 2007, defendant worked as a security guard at a restaurant where Cinthya Rodriguez[2] was a waitress, and they became good friends and, according to some evidence, had an affair at one time. In March 2008,[3] Cinthya was living in an apartment in Corona with Orlando Duarte. Cinthya's aunt, Jovita Castellanos, and the aunt's husband, Arturo Uriostegui, lived at 24754 Atwood Avenue in Moreno Valley, and

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Her name also appears in the record as Cinthyia. For clarity and convenience, we use first names herein to refer to persons who share a last name.

[3] All the events described in the statement of facts took place in 2008 unless otherwise indicated.

Cinthya's sister, Yazmin, and her cousin, Claudia, lived nearby at 24730 Atwood Avenue with Yazmin's boyfriend, Arturo DeOca.

In a statement defendant made to the police,[4] he said Cinthya had complained to him that Duarte imposed restrictions on her going out. Around March 7, Cinthya told defendant that when she and Duarte had gone to Tijuana for a visit, Duarte had done something "bad" to her. She said she was staying with Duarte "out of spite," and she "was going to pay back" and "she was going to see in which way she would fuck him up." She called defendant again a few days later and said she was thinking of kidnapping Duarte. In other calls, she said she had two men to help her, and the plan was to kidnap Duarte from his apartment on Friday night, March 14, put him in the trunk of his car, and take him to Mexico. Defendant told the police she had asked him to help her, but he said he would not.

On Thursday, March 13, Cinthya asked Jose Ambrocio, another former boyfriend, to rent a U-Haul vehicle so she could move furniture from Corona to Moreno Valley. Ambrocio met Cinthya at a restaurant in Moreno Valley. Cinthya arrived in a black Mercedes[5] with DeOca, and Ambrocio drove the rental vehicle to 24730 Atwood Avenue.

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[4] Defendant was interviewed in Spanish on March 17 and 18. Recordings of the interview were played for the jury, and translated transcripts of the recordings were provided to the jury.

[5] Duarte owned a Mercedes and a Honda Prelude. He usually left the Honda at the train station in Santa Ana.

Duarte worked at the Court of Appeal in Santa Ana. On Friday, March 14, he drove into the court parking lot sometime after 7:00 a.m. That morning, Jovita saw Yazmin and DeOca leaving their house in a U-Haul vehicle, and they told her they were moving to Santa Ana. Security cameras showed a U-Haul vehicle entering Duarte's apartment complex at 9:13 a.m. and leaving at 1:55 p.m. The vehicle entered the complex several times that day. Around 4:00 p.m., a maintenance man for the complex saw the vehicle at Duarte's apartment. Two men and a woman were there, and furniture was being removed from the apartment. The maintenance man said the woman was the one who lived in the apartment. That same day, DeOca drove a red Blazer to the home of his friend, Emely Estrada, in Placentia. He told Estrada he had no job and would be leaving soon for Texas; he asked if Yazmin could stay with her, and he left Yazmin and their child with Estrada. At 5:34 p.m., a red Blazer entered Duarte's complex.

Duarte left work sometime after 4:00 p.m., and his Mercedes entered his apartment complex at 6:41 p.m. The U-Haul vehicle entered the complex for the last time that night at 11:34.

In his statement, defendant told the police that on Saturday morning, March 15, Cinthya had telephoned him and said something like, "it's done already." She also told defendant "they" had grabbed Duarte at his apartment, beaten him, tied him up, and locked him in the trunk. She said one of the men who helped her was from Los Angeles and the other from Mexico.

On Saturday morning, March 15, defendant asked his friend, Arthur Perez, to help his (defendant's) girlfriend move. Defendant told Perez he was getting a new television. Defendant gave Perez directions to Duarte's apartment, and Perez arrived there around 9:00 a.m. Defendant's girlfriend met Perez at the gate and let him in. Defendant had introduced his girlfriend to Perez a week earlier when she drove up in a black Mercedes. Perez helped two other men load a U-Haul truck with furniture from the apartment. One of the men was a cousin and roommate of defendant. A woman named Claudia was there helping defendant's girlfriend clean. Defendant's car was there, but defendant never showed up; however, defendant's roommate arrived, driving defendant's other car. Over three or four hours, the entire apartment was emptied. All of the vehicles left together. Before they left, the girlfriend gave Perez $60 or $70, called defendant, and handed the phone to Perez. Defendant asked if his girlfriend had paid Perez.

On March 15, defendant rented a storage unit in Riverside. He told the manager he wanted the largest unit available, or one that a car would fit into, and when the manager offered a unit near the front of the facility, defendant said he wanted one farther in the back. When the police inspected the unit on April 3, it was empty except for broken glass on the ground. Defendant had previously rented a smaller unit at the same facility using the name Ricardo Torres. Later, on March 15, defendant returned the U-Haul vehicle to the rental facility.

At around 7:00 p.m. on March 15, Cinthya, Claudia, and DeOca went to Jovita's house, and Cinthya asked to use the shower because the water at 24730 Atwood was

cold. She also asked to borrow blankets because Claudia and DeOca would be spending the night. Cinthya left without taking the blankets, and at approximately 10:00 p.m., Jovita and her husband went to 24730 Atwood to deliver them. When they arrived, all the lights were off. Jovita knocked, and DeOca opened the door a crack and asked her to wait. He closed the door, leaving Jovita outside, although it was raining. In a little while, DeOca and Claudia came out and took the blankets. Later that night, Cinthya came to Jovita's house in a red Blazer that defendant was driving.[6] At around 10:00 a.m. on March 16, Cinthya returned to Jovita's house with Claudia; Cinthya was driving defendant's Accord.

Jesse Preciado testified that Cinthya was an acquaintance of his wife. Between 6:00 and 8:00 p.m. on March 15, Cinthya came to the restaurant where his wife worked to borrow Preciado's red Blazer. Cinthya returned the Blazer about 1:00 a.m. on March 16.

A man telephoned Duarte's sons, Joary Galvin and Orlando Duarte, Jr., at around 10:00 p.m. on March 15, and asked for their uncle's telephone number. Duarte came on the phone in one call and told Galvin "to tell them whatever they needed to know." Duarte sounded like he was "out of breath, struggling." Galvin telephoned the police and went to Duarte's apartment complex. The police told him Duarte's apartment looked empty, and Galvin did not see Duarte's car in his assigned space.

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[6] Uriostegui denied telling the police that defendant had been in the car with Cinthya.

Shortly after 10:00 p.m. on March 15, Duarte's brother, Ublester Penaloza, received a telephone call in which Duarte told Penaloza he had been kidnapped and was in Mexico. Duarte told Penaloza to give them anything they asked for. A man got on the telephone and told Penaloza that they would call him the next day and then hung up.

Penaloza contacted the police, who placed a recording device on his telephone. On March 16, the same man called him again. He accused Penaloza of calling the police and made threats against him, his family, and Orlando, Jr. The man demanded $2 million "if [Penaloza] wanted to see [his] brother alive." Penaloza said he had no access to such a large sum. In a call on March 17, the man offered to accept $1 million plus jewelry. The man called again on March 19; Penaloza said he could come up with only $10,000, and the man agreed to accept that sum. Uriostegui identified the man's voice on the recordings as that of DeOca.

Duarte's Mercedes was discovered in a vacant lot in Mira Loma at around 2:00 a.m. on Sunday, March 16. There were large bloodstains on the rear passenger seat, seat back, and floor mat and blood drops on the headliner and driver's seat back.

During the evening of March 16, Cinthya was at the home of Emely Estrada with Claudia, Yazmin, and defendant. About 8:00 p.m., defendant's cell phone rang. He answered the phone and then handed it to Cinthya. Both went outside. About 10 minutes later, Cinthya came back inside, crying. She said to Claudia and Yazmin, "'We need to leave. Something happened at the house.'" She asked Estrada's husband to take her, Yazmin, and Claudia to Tijuana. About the same time, a phone call was made from

defendant's cell phone to Mexico. At around 10:00 p.m., the Estradas drove Cinthya, Claudia, and Yazmin to Tijuana. As they were leaving, Cinthya told defendant, who had waited outside looking nervous, to sell everything and send her the money. Once they arrived in Tijuana, Cinthya got out of the car and ran off. Cinthya, DeOca, Yazmin, and Claudia were never located.

About 9:00 p.m. on Monday, March 17, Corona Police Detective Jason Morris went to defendant's apartment complex looking for the registered owner of a cell phone with the number (951) 324-3550, which was listed in the name of Robert Enrique at that location. Detective Morris called that number and got no response, but he received a call from a different number by a man speaking Spanish and then a call from an English-speaking man from the 3550 number. Defendant arrived at the apartment complex in his brown Honda with a woman. Detective Morris asked to see defendant's cell phone, and he found his own number on the phone's recent call list. Defendant first denied calling the detective's number and then he said another person had called him and had asked him to call that number. In a search of defendant's Honda, the detective found the 3550 cell phone, which showed both the call the detective had made to that number and an outgoing call to the detective's number. A napkin in the driver's door pocket of defendant's other car had DeOca's name written on it.

On Wednesday, March 19, officers saw an area of disturbed ground at 24730 Atwood. Duarte's body was located about five or six feet down. His head was wrapped in gauze, which was covered by duct tape, extending from his forehead to his chin. The

wrapping was so tight his nose and mouth were compressed, and there was bruising on the inside of his mouth. His hands had been handcuffed and wrapped in white tape. His legs were wrapped together in gauze and duct tape. There was no indication he had struggled against the handcuffs or leg restraints. An electrical cord was wrapped around his knees and neck.

An autopsy showed Duarte had suffered two or three broken ribs, and he had bruises on his face, chest, and right arm and a laceration on his scalp. He also had two fractures of his hyoid bone. The pathologist opined Duarte had died from asphyxia, i.e., he was smothered by the bindings around his face.

Duarte used two cell phones: (714) 697-6486 and (951) 531-7782; Cinthya sometimes used the 7782 phone and had her own cell phone, (951) 588-3316. DeOca's cell phone number was (951) 588-3319, and defendant's cell phone number was (951) 324-3550.

Duarte (6486) had called Cinthya (7782) at 7:00 p.m. on March 14 after he arrived home. Cinthya (3316) had called DeOca (3319) at around the same time.

Duarte's second phone (7782) was used on March 14 to call defendant four times and DeOca once. That phone was used on March 15 to call defendant 14 times. Cinthya's phone (3316) was used on March 14 to call DeOca once; on March 15 to call defendant 19 times and DeOca 14 times; and on March 16 to call defendant six times and DeOca twice.

Defendant's phone (3550) was used on March 14 to call Duarte's second phone (7782) three times. Calls made from 3550 to 7782 between 3:51 and 5:11 p.m. were relayed through a cell tower 0.56 miles from Duarte's apartment.

Defendant's phone (3550) was used on March 15 to call 7782 six times, Cinthya 23 times, and DeOca twice. Five calls defendant had made to Cinthya between 6:24 and 7:36 a.m. were relayed through cell towers that were between 0.2 and 1.1 miles from the storage facility where defendant had rented the second unit. Three of those calls, made between 2:51 and 3:02 p.m., were relayed through a cell tower that was 0.3 miles from the place where Duarte's abandoned Mercedes was located. Two of those calls (4:11 p.m. and 4:41 p.m.) were relayed through a cell tower that was 0.09 miles from where the U-Haul vehicle was returned. A call at 10:44 p.m. was relayed through a cell tower that was 0.9 miles from 24730 Atwood.

Defendant's phone (3550) was used on March 16 to call Cinthya four times. Calls at 12:19 and 12:28 a.m. were relayed through a cell tower located 1.1 miles from 24730 Atwood.

DeOca's phone (3319) was used on March 14 to call 7782 once and Cinthya once; on March 15 to call Cinthya 17 times and defendant twice; and on March 16 to call Cinthya twice.

B. Defense Evidence

Detective Brad Voorhees testified he had reviewed the security camera tapes from Duarte's apartment for March 14 and 15. On both days, he saw a brown Honda being driven through the gate. He did not see a silver-colored Honda either day.

Karina Avina, defendant's girlfriend and the mother of his child, testified that in March 2008, defendant had a "light brown, almost a silver" Honda, and his roommate Daniel Torres had a brown Honda Accord, which defendant occasionally drove. Department of Motor Vehicle records showed that the brown Honda Accord was registered in defendant's name through October 2008.

Eduardo Munoz, defendant's brother, testified that on Friday, March 14, their mother was visiting and was staying with defendant. On Saturday, March 15, Munoz and defendant had hung out at around 11:00 a.m. or 12:00 p.m. kicking a soccer ball at defendant's apartment and had gone to a restaurant from about 7:00 to 10:00 p.m. to watch the Pacquiao-Marquez fight. Munoz had gone to defendant's house after that to ask defendant for some change and some movies. Munoz did not notice anything unusual about defendant's behavior.

C. Verdicts and Sentence

The jury found defendant guilty of murder (§ 187) with the special circumstance of murder in the course of a kidnapping (§§ 190.2, subd. (a)(17)(B), 207). The jury found him not guilty of a second count of kidnapping for ransom. (§ 209, subd. (a).) The trial court sentenced defendant to life without parole (LWOP).

III. DISCUSSION

A. Sufficiency of Evidence

Defendant contends the evidence was insufficient to support his conviction of felony murder under either of the theories presented to the jury—that he had aided and abetted the crime or that he had conspired to commit the crime.[7] Defendant also challenges the sufficiency of the evidence to support the true finding on the kidnapping special circumstance allegation.

1. Standard of Review

"'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the

[7] The People contend the evidence supported defendant's guilt not only on those two theories, but also on the theory that he was a direct perpetrator. However, we need not address that argument because, in our view, the evidence amply supported defendant's conviction as an aider and abettor.

circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]" [Citation.]' [Citations.] The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."'" (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

2. Felony Murder

A defendant is liable for aiding and abetting a crime "'when he or she aids the perpetrator of an offense, knowing of the perpetrator's unlawful purpose and intending, by his or her act of aid, to commit, encourage, or facilitate commission of the offense . . . .'" (*People v. Morante* (1999) 20 Cal.4th 403, 433.) In determining whether a defendant "directly or indirectly, aided the perpetrator, with knowledge of the latter's wrongful purpose," a jury may consider whether the defendant was present at the scene of the crime; whether the defendant and the perpetrator were companions; and the defendant's conduct before and after the offense. (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.)

Although no evidence put defendant squarely at Duarte's apartment at the time the actual seizure of Duarte took place, a kidnapping continues until "'the kidnapper releases or otherwise disposes of the victim and [the defendant] has reached a place of temporary safety . . . .'" (*People v. Burney* (2009) 47 Cal.4th 203, 233.) Defendant told the police that Cinthya had called him before the kidnapping and told him of her plan for two men to confront Duarte at his apartment on Friday night, March 14, and kidnap him by putting

him in the trunk of his car. On that Friday, defendant made a series of calls between 3:51 p.m. and 5:11 p.m. that were relayed from a cell tower only 0.56 miles from Duarte's apartment. In addition, defendant rented a storage unit early on the morning of March 15, enlisted Perez to help clear out Duarte's apartment, returned the U-Haul vehicle, and, based on cell phone records, assisted in disposing of Duarte's car. Defendant was with Cinthya around the time the ransom calls were placed. During the evening of March 16, defendant and Cinthya were at Estrada's house when Cinthya apparently learned in a telephone call that Duarte was dead. Significantly, that call was made to *defendant's* cell phone. Finally, the sheer number of telephone calls between Cinthya and defendant from March 14 through 16 reasonably supports an inference that defendant encouraged or facilitated the kidnapping.

Defendant, however, characterizes his conduct as amounting to nothing more than that of an accessory after the fact. We disagree. With reference to the evidence that defendant disposed of Duarte's bloodied Mercedes on March 15, defendant relies on *People v. Balderas* (1985) 41 Cal.3d 144, 193 and 194. In that case, in rejecting the defendant's argument that the prosecutor had committed misconduct in arguing that a witness was not an accomplice, the court concluded that the witness's "assistance in disposing of evidence of the various crimes ma[de] him, at most, an accessory after the fact," and "a mere accessory is not an accomplice." (*Id.* at p. 193.) The court further explained, "there was no evidence that [the witness] lent defendant his car with knowledge or intent that it would assist defendant in the commission of crimes. Though

[the witness] and defendant later drove to the hospital for the criminal purpose of stealing money from parked cars, [the witness] immediately disassociated himself from defendant's new plan to rob [the victim], saying he wanted no part of a robbery. He then drove away, leaving defendant behind." (*Id.* at p. 194.) *Balderas* is distinguishable. Defendant's close involvement with Cinthya over the course of three days, knowing of her plan and then of Duarte's seizure, was far different from that of the accessory in *Balderas*.

Moreover, as noted, defendant's cell phone records show he was at or near Duarte's apartment not long before Duarte returned home from work on March 14, and the People argue that evidence could reasonably support a finding defendant was acting as a lookout. Defendant counters that his mere presence was insufficient to support a finding that he was a lookout. In *People v. Hill* (1946) 77 Cal.App.2d 287, for example, the court found insufficient evidence of aiding and abetting when the defendant drove robbers to a bar, slept in his car while they committed a robbery, then drove them away, and did not participate in the fruits of the crime. (*Id.* at pp. 288-291.) The court stated that to make a person guilty as an aider and abettor, it must be shown that he actively aided and encouraged the perpetrators "and that he did so with knowledge of the felonious intention." (*Id.* at p. 294.) The factor of knowledge makes this case distinguishable from *Hill*. As recounted above, defendant admitted he knew in advance of Cinthya's intent to kidnap Duarte. Thus, the evidence showed more than mere

presence and was sufficient to create an inference he was assisting in the consummation of the kidnapping.

3. Kidnapping Special Circumstance

The jury was instructed with CALCRIM Nos. 700[8] and 703[9] and returned a special verdict finding that Duarte's murder "was committed while the defendant . . . was engaged in the attempted commission of the crime of KIDNAPPING, in violation of

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[8] CALCRIM No. 700, as read to the jury, provides: "If you find the defendant guilty of first degree felony murder, you must also decide whether the People have proved that the special circumstance is true. [¶] The People have the burden of proving the special circumstance beyond a reasonable doubt. If the People have not met this burden, you must find the special circumstance has not been proved. You must return a verdict form stating whether the special circumstance is true. [¶] In order for you to return a finding that a special circumstance is or is not true, all 12 of you must agree."

[9] CALCRIM No. 703, as read to the jury, provides: "If you decide that the defendant is guilty of first degree felony murder but was not the actual killer, then, when you consider the special circumstance of murder in the commission of kidnapping, you must also decide whether the defendant acted either with intent to kill or with reckless indifference to human life. [¶] In order to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor or a member of a conspiracy, the People must prove either that the defendant intended to kill, or the People must prove all of the following: [¶] 1. The defendant's participation in the crime began before or during the killing; [¶] 2. The defendant was a major participant in the crime; [¶] AND [¶] 3. When the defendant participated in the crime, he acted with reckless indifference to human life. [¶] A person acts with reckless indifference to human life when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death. [¶] The People do not have to prove that the actual killer acted with intent to kill or with reckless indifference to human life in order for the special circumstance of murder in the commission of kidnapping to be true. [¶] If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that he acted with either the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstance of murder in the commission of kidnapping to be true. If the People have not met this burden, you must find the special circumstance has not been proved true."

section 207 . . . as alleged in the allegation of special circumstance, within the meaning of . . . section 190.2, subdivision (a), subsection (17), subparagraph (B)."

Section 190.2 calls for a sentence of death or LWOP for a person found guilty of first degree murder with a special circumstance, including kidnapping. (§ 190.2, subd. (a)(17)(B).) The statute provides that an aider and abettor who intends to kill or who acts "with reckless indifference to human life and as a major participant" is subject to the penalty of death or LWOP. (§ 190.2, subds. (c), (d).) A "major participant" includes a person """notable or conspicuous in effect or scope" and "one of the larger or more important members . . . of a . . . group."""" (*People v. Hodgson* (2003) 111 Cal.App.4th 566, 578, fn. omitted.) Reckless indifference to human life includes "knowingly engaging in criminal activities known to carry a grave risk of death." (*Tison v. Arizona* (1987) 481 U.S. 137, 157 (*Tison*).)

The People contend the following evidence showed that defendant was a major participant: defendant "repeatedly discussed and conspired with Cinthya about the kidnapping and the plan to carry it out," and "his close proximity to the kidnapping reasonably supports an inference he was acting as a lookout; the kidnapping and theft were inextricably intertwined and [defendant] acted to ensure the enterprise was successful by arranging Perez's assistance, renting a storage unit where the stolen goods could be stored while the theft was taking place, and returning the rental vehicle used in transporting the stolen goods." In addition, as previously recounted, defendant abandoned Duarte's car, drove Cinthya to Jovita's house the night the ransom demand

calls began, and was with her just before she fled to Mexico. Finally, she directed him to sell her property and send her the money.

The *Tison* court noted that "major participation" and "reckless indifference to human life" are distinct requirements, but they frequently overlap. Thus, one could properly conclude as to certain felonies that every major participant necessarily exhibits reckless indifference to human life. (*Tison, supra*, 481 U.S. at p. 158, fn. 12.) In *Tison*, the court suggested that a getaway driver who "merely [sat] in a car away from the actual scene of the murders" would not be a major participant in the crime of robbery. (*Id.* at p. 158.) In contrast, in *People v. Smith* (2005) 135 Cal.App.4th 914, overruled on another ground as stated in *People v. Garcia* (2008) 168 Cal.App.4th 261, 291, the court held that a defendant was a major participant in an attempted robbery that resulted in a murder when "he was one of only three perpetrators, and served as the only lookout to an attempted robbery occurring in an occupied motel complex." (*People v. Smith, supra,* at p. 928.) In *People v. Hodgson*, *supra*, 111 Cal.App.4th at pages 579 and 580, the court held that one of the two robbers who held open an electric garage gate so the actual killer could escape was a major participant.

As noted, kidnapping is a continuing crime, and that crime was ongoing when defendant took all the actions previously listed. The jury could reasonably conclude defendant was a major participant.

The jury could also reasonably conclude defendant acted with reckless indifference based on "knowingly engaging in criminal activities known to carry a grave

risk of death." (*Tison, supra*, 481 U.S. at p. 157.) California courts have long recognized that kidnapping is a felony inherently dangerous to life. (*People v. Howard* (2005) 34 Cal.4th 1129, 1136, citing *People v. Greenberger* (1997) 58 Cal.App.4th 298, 377; see also *In re Nunez* (2009) 173 Cal.App.4th 709, 725 [stating that "even *simple* kidnapping . . . presents a grave risk of danger"]; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227-1228 [collecting cases].) We therefore agree that the evidence reasonably supports a conclusion that defendant acted with reckless indifference.

B. Merger Instruction

Defendant contends the trial court erred in failing to instruct on merger.

The merger doctrine was developed "due to the understanding that the underlying felony [for purposes of felony murder] must be an independent crime and not merely the killing itself." (*People v. Chun* (2009) 45 Cal.4th 1172, 1189.) The doctrine arose in *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*), in which the court held that assault with a deadly weapon could not be used as the underlying felony for an instruction on second degree felony murder. The court explained that such use of the felony-murder rule would "effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law." (*Id.* at p. 539.)

In *People v. Wilson* (1969) 1 Cal.3d 431, 432, the court extended the merger doctrine to first degree felony murder based on a burglary committed with intent to

assault the victim. However, in *People v. Farley* (2009) 46 Cal.4th 1053, 1121, the court overruled *Wilson.* The court noted that first degree felony murder has a statutory basis in this state (§ 189), and the Legislature has the exclusive power to define crimes. (*People v. Farley, supra,* at pp. 1118-1119.) The court held: "Policy concerns regarding the inclusion of burglary in the first degree felony-murder statute remain within the Legislature's domain, and do not authorize this court to limit the plain language of the statute." (*Id.* at p. 1121.) Finding the holding in *Wilson* inconsistent with that plain language, the court overruled *Wilson.* (*People v. Farley, supra,* at p. 1121.) However, the court expressly made its holding prospective only "due to ex post facto concerns." (*Ibid.*) Defendant argues that his crime, committed in 2008, before the *Farley* opinion was issued, should therefore be governed under the rule set forth in *Wilson.* He contends that a simple kidnapping intended to facilitate an assault is the equivalent of the burglary in *Wilson.* We disagree.

First, courts have not extended the merger doctrine beyond the context of various forms of assault. (*People v. Hansen* (1994) 9 Cal.4th 300, 312, overruled by *People v. Chun, supra,* 45 Cal.4th at p. 1201, fn. 8.) In *People v. Mattison* (1971) 4 Cal.3d 177, for example, the court refused to extend the merger doctrine to a defendant who supplied the victim, a fellow prison inmate, with methyl alcohol, resulting in the victim's death. In affirming the defendant's second degree murder conviction, the court explained that because the defendant exhibited a "collateral and independent felonious design" that was separate from the resulting homicide, the situation was entirely different from that in

Ireland. (*People v. Mattison, supra*, at p. 185.) Similarly, in *People v. Gonzales* (2011) 51 Cal.4th 894, the court held the merger doctrine did not apply to mayhem felony murder because the defendant's intent to permanently disfigure the victim went "well beyond the merely assaultive purpose . . . considered incompatible with the felony-murder rule." (*Id.* at p. 943.) The court stated that "[t]he primary policy reason for the felony-murder doctrine was fully operative in the circumstances of this case. 'The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony.'" (*Ibid.*)

Second, courts have expressly declined to apply the merger doctrine to felony murder based on kidnapping. (*People v. Kelso* (1976) 64 Cal.App.3d 538, 541-542.) In that case, the court held that the merger rule of *Ireland* did not apply because "[t]he kidnapping was separate from the homicides and supplied the malice necessary for [the defendant's] conviction of second degree murder."[10] (*People v. Kelso, supra,* at p. 542.) In *People v. Smith* (1984) 35 Cal.3d 798, 805, our Supreme Court cited *Kelso* with approval, stating: "Cases in which the second degree felony-murder doctrine has withstood an *Ireland* attack include those in which the underlying felony was . . .

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[10] Kidnapping was not added to the list of enumerated felonies included in first degree felony murder until 1990. (See § 189; Initiative Measure (Prop. 115), approved June 5, 1990, eff. June 6, 1990.)

kidnapping . . . ." We therefore conclude the trial court did not err in failing to instruct the jury on the merger doctrine.

C. Parole Revocation Restitution Fine

Defendant contends the trial court erred in imposing a parole revocation restitution fine. At sentencing, the trial court ordered defendant to pay a $10,000 parole revocation restitution fine (§ 1202.45), and suspended the fine unless parole was revoked.

The People properly concede the parole revocation restitution fine was erroneously imposed because defendant was sentenced to LWOP. (See *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) We will therefore order the fine stricken.

IV. DISPOSITION

The trial court is directed to strike the reference to the parole revocation restitution fine from the minute order of the sentencing hearing, to prepare a new abstract of judgment omitting reference to such fine, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORT

HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.